92-397

No._____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

OCCIDENTAL CHEMICAL CORPORATION,

Petitioner,

v.

CEMCOM CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals violated well-established Supreme Court precedent by reversing a factual finding of the District Court which the Court of Appeals admitted was plausible and thus, not "clearly erroneous"?

PARTIES

The parties to the proceedings below both appear in the caption of this case. Pursuant to Rule 29.1 of this Court, Occidental Chemical Corporation states that it is an indirect wholly-owned subsidiary of Occidental Petroleum Corporation.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Occidental Chemical Corporation ("OxyChem") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on May 26, 1992, reversing the judgment of the District Court of Maryland.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is not published, by order of that Court, and is reprinted in the appendix ("A") hereto at A-2. The opinion of the United States District Court for the District of Maryland is also not published and is reprinted at A-22.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on May 26, 1992. Rehearing and suggestion for rehearing *en banc* were denied on June 29, 1992. This petition is filed within 90 days of the date of the denial of rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(i).

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Former Rule 41(b) of the Federal Rules of Civil Procedure provided:

> "**Involuntary Dismissal: Effect Thereof.** For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal on the grounds that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a).

> Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits."

Fed. R. Civ. P. 41(b) (1991).[1]

Former Rule 52(a) of the Federal Rules of Civil Procedure provided:

> "(a) **Effect.** In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing

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1 Former Rule 41(b) was amended effective December 1, 1991. The pertinent portion of Rule 41(b) was incorporated into Rule 52(c) on that date. Rule 52(c) provides:

> "(c) **Judgment on Partial Findings.** If during a trial without a jury a party has been fully heard with respect to an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against the party on any claim, counter claim, cross-claim or third-party claim that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule."

> interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in Rule 41(b)."

Fed. R. Civ. P. 52(a) (1991).[2]

STATEMENT OF THE CASE

This case has its genesis in a license agreement entered into by OxyChem and Cemcom Corporation ("Cemcom") effective March 1, 1986 (the "License Agreement"), in which

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2 Former Rule 52(a) was amended effective December 1, 1991. The last sentence of Rule 52(a) now states:

> "Findings of fact and conclusions of law are unnecessary on decisions on motions under Rule 12 or 56 or any other motion except as provided in subdivision (c) of this rule."

Cemcom granted OxyChem the exclusive worldwide license with respect to certain cementitious compounds ("know-how"). Section 11.3 of the License Agreement granted OxyChem the unilateral right to terminate:

> "At any time after September 1, 1987, OXYCHEM may elect to terminate this Agreement upon six (6) months written notice, and during the six (6) month period, OXYCHEM shall continue with its obligations . . . . This notice shall be ineffective unless OXYCHEM shall have made a good faith determination to abandon the KNOW-HOW."

At a meeting between the parties held on November 27, 1989, OxyChem hand-delivered a letter to Cemcom notifying Cemcom that OxyChem was terminating the License Agreement pursuant to Section 11.3. This letter followed several earlier discussions in which OxyChem expressly told Cemcom that it desired to exit the business. Several options were discussed to achieve this exit in an orderly manner. The parties agreed to pursue one of these options. In OxyChem's letter a formal proposal was set forth, pursuant to which the License Agreement would terminate and OxyChem would form a new corporation that would be the licensee of the know-how. Under any of the proposed arrangements, OxyChem would have had no rights to the know-how and as a result would have "abandoned" its rights to such know-how.

Negotiations aimed at restructuring the relationship between the parties eventually broke down, and on June 15, 1990 -- nearly seven months after it received the

November 27th termination letter -- Cemcom filed a complaint in the United States District Court for the District of Maryland against OxyChem, invoking that Court's diversity jurisdiction under 28 U.S.C. § 1332. Cemcom sought injunctive and declaratory relief as well as damages for OxyChem's alleged breach of the License Agreement. Cemcom also filed a motion for a preliminary injunction seeking to enjoin OxyChem from terminating the License Agreement.

On June 26, 1990, the Honorable Frederic N. Smalkin held a hearing on Cemcom's motion for a preliminary injunction. Cemcom called one witness, Dennis Townsend, who was cross-examined by OxyChem's counsel. At the conclusion of Townsend's testimony, Judge Smalkin stated that he had decided to consolidate the trial of the action on the merits with the preliminary injunction hearing pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure, and invited Cemcom to present any other evidence that it had. Cemcom elected to rest its case at that point, despite the presence of several potential witnesses in the courtroom.

At this time and before presenting its own case on the merits, OxyChem moved for dismissal of the action under former Rule 41(b) of the Federal Rules of Civil Procedure. Following the arguments of counsel, the Court granted OxyChem's Rule 41(b) motion and issued an opinion which provided findings of fact and conclusions of law as required by Rule 52(a) of the Federal Rules of Civil Procedure. The Court concluded, *inter alia*, that (1) OxyChem's "abandonment" of the know-how under the License

Agreement meant "abandonment" of its rights as licensee under the License Agreement, (2) OxyChem's decision to abandon the know-how was made in good faith because OxyChem was losing money on the know-how, and (3) OxyChem's notice was sufficient (A-25 - A-30). The Court proceeded to enter judgment on the merits in favor of OxyChem in open court and in a subsequent written order (A-30, A-17). The Court also denied Cemcom's subsequent motion for a new trial (A-19).

Cemcom appealed the District Court's order to the United States Court of Appeals for the Fourth Circuit. In their briefs to the Court of Appeals, both parties acknowledged that the factual findings of the District Court could not be set aside unless they were clearly erroneous. In its opinion issued on May 26, 1992, the Court of Appeals did not address the standard of review that it applied, nor did it state that the District Court's findings were clearly erroneous. Nevertheless, the majority reversed the factual findings of the District Court and remanded the case for proceedings not inconsistent with its opinion, holding that OxyChem did not have a good faith intent to "abandon" the know-how at the time of its November 27th letter, thus rendering its notice of termination ineffective (A-11). In so doing, the Court deprived OxyChem of the opportunity to present its case regarding the effectiveness of the notice of termination.

Judge Shedd dissented in part, stating that "[t]he majority's opinion . . . forecloses the defendant from establishing, through evidence other than the November 27th letter, that a determination to 'abandon,' as that term is

interpreted by this Court, was made prior to November 27, 1991" (A-12).

On June 8, 1992, OxyChem petitioned the United States Court of Appeals for the Fourth Circuit for rehearing with a suggestion for rehearing *en banc*. The Court denied this petition on June 29, 1992 (A-1).

REASONS FOR GRANTING THE WRIT

I

THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWER AND REASSERT THAT UNDER FED. R. CIV. P. 52(a) THE FINDINGS OF FACT MADE BY A DISTRICT COURT MAY ONLY BE SET ASIDE IF THEY ARE CLEARLY ERRONEOUS

This case presents an opportunity for this Court to exercise its supervisory power over the lower federal courts and reassert that, under Rule 52(a) of the Federal Rules of Civil Procedure, the "clearly erroneous" standard governs appellate review of factual findings by district courts. The case also presents an opportunity for this Court to clarify how the "clearly erroneous" standard is to be applied and thus prevent a grave injustice.

In its decision below, the Court of Appeals ignored the long line of holdings of this Court and usurped for itself what is properly the function of a trial court. *Anderson v. Bessemer*, 470 U.S. 564, 574 (1985). Such a usurpation threatens the credibility and integrity of the federal judicial

system. Moreover, the Court of Appeals has deprived petitioner of the opportunity to present evidence on key issues in this case solely because it chose to avail itself of a procedure created for the purpose of simplifying and expediting litigation.

The interests of justice and the proper management of the judicial system require that the Court grant this petition for a writ of certiorari and reverse the judgment of the Court of Appeals, which is so clearly mistaken and in direct conflict with numerous decisions of this Court. In addition, this case presents the Court with the opportunity to clarify the separate and distinct functions performed by trial and appellate courts in the federal system.

A. THE HOLDING OF THE COURT OF APPEALS CONFLICTS WITH A LONG LINE OF SUPREME COURT PRECEDENTS

In the proceeding below, the single issue presented on appeal was whether the District Court had properly construed the parties' contract -- specifically, whether the District Court's determination of what the parties intended by the term "abandon" was clearly erroneous (A-8).

The Court of Appeals held that the lower court had misinterpreted the contract and proceeded to substitute its own interpretation of "abandon" for that of the District Court, referring to Black's Law Dictionary as its source (A-9). The Court of Appeals stated, however, that OxyChem's interpretation of the contractual language -- which was adopted by the District Court -- was "not

implausible," but that Cemcom's interpretation based on the testimony of its sole witness -- which the Court of Appeals adopted -- "represents the better reading of the actual contract language" (A-9).

Courts in the Fourth Circuit and elsewhere have consistently held that where a trial court determines the intent of contracting parties by using extrinsic evidence, the court's findings on this issue are factual in nature. *Marine Transport Lease Inc. v. International Organization of Masters, Mates & Pilots*, 878 F.2d 41, 44 (2d Cir. 1989), *cert. denied*, 493 U.S. 1022 (1990); *St. Lawrence Cement, Inc. v. Spivey*, 815 F.2d 965, 968 (4th Cir. 1987); *see also Abrams v. Feinblatt*, 80 Bankr. Rep. 358, 360 (D. Md. 1987) (use of extrinsic evidence in interpreting a contractual agreement involves findings of fact which must be reviewed under the "clearly erroneous" standard), *aff'd*, 849 F.2d 604 (4th Cir. 1988). As the Court of Appeals stated, the sole issue in the appeal of this action was the interpretation of the term "abandon" within the meaning of the License Agreement. In attempting to ascertain the parties' intent, the District Court used extrinsic evidence, specifically, the testimony of Cemcom's President and a draft of the License Agreement (A-26, A-28). As a result, the findings of the District Court reviewed on appeal were factual in nature.

Former Rule 41(b) expressly referenced former Rule 52(a), which established the "clearly erroneous" standard as the standard governing appellate review of factual findings made by trial judges. As a result, the "clearly erroneous" standard is the standard that should have been applied by the

Court of Appeals in reviewing the District Court's determination of what the parties intended by the term "abandon" in the License Agreement.[3] Although the Court of Appeals did not specify the standard of review employed in reversing the District Court, it is clear that it did not employ the "clearly erroneous" standard.

The text of Rule 52(a) does not define "clearly erroneous"; however, this Court has taken several opportunities to do so over the years. In *United States v. United States Gypsum*, 333 U.S. 364, 395 (1948), this Court stated that:

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

The following term, in *United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949), the Court went a step further and expressly rejected the suggestion that an appellate court may

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3 The Fourth Circuit has stated on a number of occasions that the "clearly erroneous" standard governs the appellate review of findings of fact made by trial courts in deciding Rule 41(b) motions. *Lawrence v. Mars, Inc.*, 955 F.2d 902, 905 (4th Cir.) ("These factual findings may be set aside only if clearly erroneous"), *petition for cert. filed*, 60 U.S.L.W. 3843 (U.S. June 1, 1992) (No. 91-1931); *Kadala v. Amoco Oil Company*, 820 F.2d 1355, 1358 (4th Cir. 1987) (factual findings made pursuant to Rule 41(b) dismissals are reviewed under the "clearly erroneous" standard of Fed. R. Civ. P. 52(a)); *Holmes v. Bevilaqua*, 794 F.2d 142, 147 (4th Cir. 1986) ("On appeal this finding of the district court may only be set aside if clearly erroneous").

replace a district court's findings of fact with its own findings if the district court's findings are reasonable, stating that, "*a choice between two permissible views of the weight of evidence is not clearly erroneous*" (emphasis added). Several years later, in *Zenith Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969), this Court admonished appellate courts that they "must constantly have in mind that their function is not to decide factual issues *de novo*." In *Pullman Standard v. Swint*, 456 U.S. 273, 287 (1982), this Court again reminded appellate courts of their "obligation . . . to accept a district court's findings unless clearly erroneous." In the same term, in *Inwood Laboratories v. Ives Laboratories*, 456 U.S. 844, 856 (1982), this Court reversed the decision of a court of appeals which had set aside the factual findings of a trial court, stating:

> "By rejecting the District Court's findings simply because it would have given more weight to evidence . . . than did the trial court, the Court of Appeals clearly erred."

Three years after deciding *Pullman Standard* and *Inwood Laboratories*, this Court addressed the "clearly erroneous" standard in the strongest tone yet. In *Anderson v. City of Bessemer*, 470 U.S. 564 (1985), the Court held that an appellate court had misunderstood and misapplied the "clearly erroneous" standard in an action arising under Title VII of the Civil Rights Act of 1964. The Court of Appeals had in effect conducted a *de novo* review of the record and had overturned the District Court's findings, claiming that such findings were clearly erroneous. This Court reversed

the Court of Appeals' decision, holding that it had misapplied the "clearly erroneous" standard, and stated that:

> "If the district court's account of the evidence is *plausible* in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. *Where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous.*"

470 U.S. at 573-574 (emphasis added).

The Court again clarified the appellate court's proper role in *Icicle Seafood Inc. v. Worthington*, 475 U.S. 709, 714 (1986), stating:

> "If the Court of Appeals believed that the District Court had failed to make findings of fact essential to a proper resolution of the legal question, it should have remanded to the District Court to make those findings. If it was of the view that the findings of the District Court were 'clearly erroneous' within the meaning of Rule 52(a), it could have set them aside on that basis. If it believed that the District Court's factual findings were unassailable, but that the proper rule of law was misapplied to those findings, it could have reversed the District Court's judgment. *But it should not simply have made factual findings on its own*" (emphasis added).

The action taken by the Court of Appeals in reversing Judge Smalkin's decision conflicts with these precedents. The Court of Appeals did not hold that it had determined that the District Court's factual findings were egregiously mistaken, nor did it suggest that there was only one permissible view of the evidence. Rather, it determined that it preferred one permissible view of the evidence over another (A-9).

The Court of Appeals even went so far as to state that the petitioner's interpretation of the License Agreement -- which was adopted by the District Court -- was "not implausible" (A-8). In other words, the Court of Appeals *expressly* stated that there were two possible views of the weight of the evidence, but nevertheless, set aside the findings of the District Court, stating that its own findings were a "better reading" of the contract language (A-9). Regardless of what standard of review the Court of Appeals was purportedly applying, since there was no determination that the factual findings of the District Court were "clearly erroneous," such factual findings should not have been set aside.

The Court of Appeals' holding directly contradicts the holding of this Court in *Anderson*, where this Court plainly stated that a "*plausible*" factual finding of a district court may *not* be set aside by a court of appeals even if the court fully believes that it would have made a different factual determination. It is apparent that in making the finding that it did, the Court of Appeals not only disregarded this Court's

clear instruction on this issue, but in fact did precisely what it was expressly forbidden to do by this Court in *Anderson*.

The Court of Appeals' disregard for this Court's precedents is compounded by the fact that the District Court's factual findings resulted in part from its evaluation of the testimony of a witness and the necessary credibility determinations regarding that witness. As this Court stated in *Anderson*:

> "When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said."

470 U.S. at 575. Therefore, since such a credibility determination was made by the District Court with regard to Mr. Townsend's testimony, the Court of Appeals was obligated to show an even higher degree of deference to the findings of the District Court than it would have had it merely been reviewing documentary evidence. Once again, this obligation was completely disregarded by the Court of Appeals which, without having had the opportunity to observe Mr. Townsend and evaluate his credibility at the hearing below, nevertheless approvingly cited his testimony in making the determination that the District Court's findings of fact should be reversed (A-8n.2).

B. THE HOLDING OF THE COURT OF APPEALS DEPRIVES PETITIONER OF THE OPPORTUNITY TO PRESENT ITS EVIDENCE

The error of the Court of Appeals' decision is made worse by its pernicious consequence. In *Anderson*, this Court suggested that the trial on the merits should be the "main event" rather than a "tryout on the road." 470 U.S. at 574. In this case, the Court of Appeals' decision not only renders the trial a "tryout on the road," but also renders the tryout closed after only one act. By substituting the trial court's determination of fact with its own unfounded view, the Court of Appeals has deprived petitioner of the opportunity to present evidence on key issues in the case.

The Court of Appeals substituted its own construction of the term "abandon" for that of the fact finder despite the fact that petitioner did not have the opportunity to present a shred of evidence on the issue, since its Rule 41(b) motion was granted at the close of plaintiff's case. Stated differently, the Court of Appeals made a factual finding without the benefit of all of the facts.

Even if the Court of Appeals disagreed with the trial court's finding on the Rule 41(b) motion, it cannot substitute its own fact finding without affording the successful movant below the opportunity to put on its case. *United States v. United States Gypsum Co.*, 340 U.S. 76, 85 (1950) (following remand of a 41(b) dismissal "defendants had a right to introduce any evidence that they might have as to why all or any one of them should be found not to have

violated the Sherman Act").[4] As Judge Shedd's opinion below, partially dissenting from the majority, points out, it is unfair to preclude petitioner from presenting its evidence on the issue (A-16). Such a result punishes the successful movant and would have the effect of deterring the use of an effective procedure.

C. THIS COURT'S SUPERVISORY POWER SHOULD BE INVOKED TO CORRECT THE ERRONEOUS DECISION OF THE COURT BELOW

This Court should exercise its supervisory power over the lower federal courts and overturn this erroneous decision of the Court of Appeals. A decision in clear conflict with such a long line of this Court's precedents is a serious threat to the credibility and integrity of the federal system as a whole. No court should be allowed to disregard the iron-clad and unambiguous rules of law that have been established by this Court simply because it believes that doing so will produce a result that it finds more favorable. Too much is at stake -- both for the individual litigants and the federal

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4 *See also Lucas v. Burnley*, 879 F.2d 1240, 1241 (4th Cir. 1989) (in the aftermath of government's Rule 41(b) motion, "the trial resumed and the government presented its evidence"), *cert. denied*, 494 U.S. 1026 (1990); *Flowers v. Crough-Walker Corp.*, 552 F.2d 1277, 1285 (7th Cir. 1977) ("on remand after reversal of an involuntary dismissal under Rule 41(b) . . . the case may proceed with the defendant's presentation of evidence"); *White v. Rimrock Tidelands, Inc.*, 414 F.2d 1336, 1340 (5th Cir. 1969) (following reversal of Rule 41(b) dismissal, "the action must be remanded for further proceedings to allow the defendant to present his case").

judiciary as a whole -- to allow this decision to remain in force and thereby endorse the use of *de novo* review by appellate courts.

As this Court established in *Anderson*, supra, the prohibition of *de novo* review by appellate courts is rooted in the important policies of preserving scarce judicial resources and assuring that the tribunal with the greatest expertise passes judgment. As this Court stated:

> "The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources."

470 U.S. at 574-575.

Therefore, the error made by the Court of Appeals is not a trivial mistake with consequences that are restricted to the petitioner. On the contrary, it is a blatant error that conflicts with almost fifty years of this Court's efforts to define the proper functions of trial and appellate courts. Certainly an issue as fundamental as the clarification of the proper disposition of scarce judicial resources and of the role that the different courts play within the federal system is sufficiently important to merit this Court's consideration.

While it is quite true that the primary responsibility of the Supreme Court is not to correct errors in the courts below, this Court has recognized in the past that its role as the supervisor of the lower federal courts nevertheless often requires it to perform this function.[5] As Justice Stevens stated in his dissent in *Pennsylvania v. Bruder*, 488 U.S. 9, 13 (1988), "there are cases in which 'there are special and important reasons' for correcting an error that is committed by another court." Certainly, such "special and important reasons" are present when the error committed by "another court" is one in such clear conflict with a series of unambiguous holdings of this Court, and concerns a matter that is as fundamental as the proper function of appellate courts within the federal judicial system.[6]

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5 *See Florida v. Rodriguez*, 469 U.S. 1, 7 (1984) (Stevens, J., dissenting) ("As the Court of last resort in the federal system, we have supervisory authority and therefore must occasionally perform a pure error-correcting function in federal litigation"); *United States v. Hale*, 422 U.S. 171, 181 (1975) (Court concluded that an error was made below and, based on its supervisory power over federal courts, orders a new trial); *Gibson v. Lockheed Aircraft Co.*, 350 U.S. 356, 357 (1956) ("We consider this to be a case where, in the exercise of our supervisory power over the lower federal courts, the judgment of the Court of Appeals should be reversed in the interests of justice and that of the District Court reinstated").

6 Rule 10.1(a) of the Supreme Court Rules provides that a writ of certiorari may issue if a United States court of appeals "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision."

The degree to which the decision of the Court of Appeals deviated from this Court's precedents further enhances the need for an exercise of this Court's supervisory power over lower federal courts in this instance. As Justice Brennan stated in his concurring opinion in *United States v. Young*, 470 U.S. 1, 34 (1985), "Our institutional role properly is focused on ensuring clarity and uniformity of legal doctrine." Regrettably, maintaining such "clarity and uniformity" -- and thereby ensuring that just results are produced in each and every federal litigation -- often requires that this Court revisit an issue that it believed to have been long settled.

In view of the erroneous nature of the decision below, the appellate court's disregard for the past holdings of this Court, the injustice that has been visited on the petitioner and the threat that this decision poses to the integrity and credibility of the federal judicial system, the Court should grant this petition and reassert that the "clearly erroneous" standard, as defined in *Anderson v. Bessemer*, governs the review of the factual findings of district courts by courts of appeals.

CONCLUSION

For the reasons stated above, a writ of certiorari should be granted to review the judgment of the Court of Appeals for the Fourth Circuit.

Dated: August 26, 1992

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
June 29, 1992

---------- X

CEMCOM CORPORATION :

Plaintiff - Appellant :

No. 90-1813

v. :

OCCIDENTAL CHEMICAL CORPORATION :

Defendant - Appellee :

---------- X

On Petition for Rehearing with Suggestion
for Rehearing In Banc

The appellee filed a petition for rehearing with suggestion for rehearing in banc. No member of the Court requested a poll on the suggestion for rehearing in banc, and the original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Luttig, with the concurrence of Judge Widener. Judge Shedd, United States District Judge sitting by designation, voted to grant the petition for rehearing.

For the Court,

/s/ Bert M. Montague

CLERK

William Salvatore D'Amico, Esq.
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Unpublished

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

----------X

CEMCOM CORPORATION, :

Plaintiff - Appellant, :

No. 90-1813

v. :

OCCIDENTAL CHEMICAL CORPORATION, :

Defendant - Appellee. :

----------X

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Frederic N. Smalkin, District Judge.
(CA-90-1617-S)

Argued: December 5, 1991

Decided: May 26, 1992

Before WIDENER and LUTTIG, Circuit Judges, and SHEDD, United States District Judge for the District of South Carolina, sitting by designation.

Reversed and remanded by unpublished opinion. Judge Luttig wrote the majority opinion, in which Judge Widener joined. Judge Shedd wrote a concurring and dissenting opinion.

COUNSEL

ARGUED: Allan Pike Hillman, FRANK, BERNSTEIN, CONAWAY & GOLDMAN, Baltimore, Maryland, for Appellant. William Salvatore D'Amico, CHADBOURNE & PARKE, Washington, D.C., for Appellee. **ON BRIEF:** Paul M. Vettori, FRANK, BERNSTEIN, CONAWAY & GOLDMAN, Baltimore, Maryland, for Appellant. Kenneth R. Pierce, Robert A. Schwinger, CHADBOURNE & PARKE, Washington, D.C., for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

LUTTIG, Circuit Judge:

Appellant Cemcom Corporation ("Cemcom") filed this action against appellee Occidental Chemical Corporation ("Oxychem"), alleging that Oxychem had attempted to terminate its license agreement with Cemcom without satisfying its contractual obligation to make a "determination to abandon" the technology that was the subject of the parties' agreement. The district court held that Oxychem had in fact satisfied that requirement, and entered judgment for Oxychem. We conclude that the district court misconstrued the parties' contract and that Oxychem did not satisfy its obligation to make a determination to abandon the technology. We therefore reverse.

I.

Cemcom entered into a written license agreement with Oxychem on March 1, 1986. Pursuant to the agreement, Cemcom granted Oxychem a fifty-year license to make, use and sell certain cementitious-based composite products, see J.A. at 108-11, referred to in the agreement as the "KNOW-HOW," *see id.* at 139. Cemcom also granted Oxychem the right to appoint the manager of Cemcom's business. *Id.* at 118-19. In exchange for these rights, Oxychem was required to make certain royalty payments to Cemcom, *id.* at 112-14, and to finance Cemcom's operating deficiencies, *id.* at 115-18.

Section 11.3 of the agreement gave Oxychem the right to terminate the contract. The section provided as follows:

> At any time after September 1, 1987, OXYCHEM may elect to terminate this Agreement upon six (6) months written notice, and during the six (6) month period, OXYCHEM shall continue with its obligations pursuant to Section 6. *This notice shall be ineffective unless OXYCHEM shall have made a good faith determination to abandon the KNOW-HOW.* In the event of the termination of this Agreement by reason of OXYCHEM's default or a termination. [sic] pursuant to Section 11.3, OXYCHEM shall return to CEMCOM any KNOW-HOW, including without limitation any data, plans, specifications, manufacturing and operating methods and processes, flowsheets, designs and drawings which OXYCHEM may possess or control and OXYCHEM shall not

> directly or indirectly engage in any business based on cementitious products.

Id. at 123 (emphasis added), Oxychem was thus required to give six months' written notice and to make "a good faith determination to abandon" the KNOW-HOW technology in order to terminate its agreement with Cemcom.

On November 27, 1989, Oxychem sent Cemcom a letter that read, in relevant part, as follows:

> First, this letter is OxyChem's official notification that we intend to terminate the Cemcom License six months from the date of this letter if we are unable to restructure our relationship as described in this letter.
>
> Secondly, if we are able to restructure our relationship as follows, OxyChem's desire is to remain with the Cemcom technology.

Id. at 144. The letter went on to outline Oxychem's proposed reorganization, according to which Cemcom and Oxychem would form a new entity that would be the licensee of the technology. *Id.* at 144-48.

Between December 1989 and April 1990 Oxychem and Cemcom discussed various restructuring plans, but were ultimately unable to agree on a plan. In May 1990, Oxychem notified customers and suppliers that its agreement with Cemcom would be terminated as of June 30, 1990.

On June 15, 1990, Cemcom filed a complaint in the United States District Court for the District of Maryland and moved for

a preliminary injunction prohibiting Oxychem from terminating the agreement. The basis of the complaint was that Oxychem's November 27, 1989, letter was ineffective as a notice of termination because Oxychem had failed to make a determination to "abandon" the technology, as required by the license agreement. Cemcom contended that Oxychem's expressed interest in restructuring its relationship confirmed that Oxychem had not made a determination to abandon the KNOW-HOW technology.

The district court consolidated Cemcom's preliminary injunction hearing with the trial on the merits, pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure. After Cemcom had presented its case in chief, the district court granted Oxychem's Rule 41(b) motion to dismiss Cemcom's suit.[1] It held that Oxychem had made a determination to abandon the KNOW-HOW technology and that Oxychem's continued loss of money provided a "good faith basis" for its determination. *Id.* at 241-43. The court rejected Cemcom's contention that Oxychem's expressed interest in restructuring was inconsistent with a determination to abandon. The court thereafter entered judgment on the merits, *id.* at 245, 326, and denied Cemcom's motion for a new trial, *id.* at 335-37. This appeal followed.

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1 At the time of the trial, Rule 41(b) provided, in relevant part, as follows: "After the plaintiff, in an action tried by the court without a jury, has completed the presentation of evidence, the defendant . . . may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief." Fed. R. Civ. P. 41(b), 480 U.S. 992 (1987). This portion of Rule 41(b) is no longer in force.

II.

The single issue presented by Cemcom's appeal is whether the parties meant by the term "abandon" that Oxychem would have no connection whatever with the KNOW-HOW technology, as Cemcom contends,[2] or merely that Oxychem would no longer be the licensee of the technology, as Oxychem contends. If the parties intended the former meaning, then Oxychem's expressed desire to restructure its relationship with Cemcom would be inconsistent with a "determination to abandon" the technology, and Oxychem would have failed to meet its contractual obligation. If the parties intended the latter meaning, then Oxychem's November 27, 1989, letter would evidence a determination to abandon the technology sufficient to satisfy its section 11.3 obligation, because Oxychem would no longer be the licensee of the KNOW-HOW following a restructuring of the relationship.

Oxychem's interpretation of section 11.3's "determination to abandon" requirement is not implausible. Cemcom's

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2 Cemcom relies not only on the language of the contract but also on extrinsic evidence to support its interpretation of section 11.3. Dennis Townsend, the president of Cemcom, who was present when the terms of the agreement were negotiated, and who was the only witness at trial, testified that the "determination to abandon" language had been inserted into section 11.3 so that Cemcom would not be presented with the choice of renegotiating on Oxychem's terms or accepting a termination of the agreement. J.A. at 204-09. According to Townsend, but for the language, Oxychem would have had "a tremendous cannon sitting at my head at the time [it] wanted to simply renegotiate the license agreement." *Id.* at 204.

interpretation, however, clearly represents the better reading of the actual contract language. *See Black's Law Dictionary* 2 (6th ed. 1990) (defining "abandon" as "[t]o give up absolutely; to forsake entirely; to renounce utterly; to relinquish all connection with or concern in"). Moreover, Oxychem's November 27, 1989, letter to Cemcom confirms that Oxychem in fact shared Cemcom's understanding of the term "abandon" at the time of the contract's execution. We therefore interpret the parties' agreement to give effect to this shared understanding of the term.

The purpose of Oxychem's letter was to provide Cemcom with the required section 11.3 notice of termination and to apprise Cemcom that Oxychem had made the requisite determination under that section to abandon the KNOW-HOW technology. The text of that letter naturally "mirrors the language of [section] 11.3," as the district court noted, J.A. at 238, and the terms of the letter draw their meaning from the terms of the agreement itself. In that letter, Oxychem stated that if its relationship with Cemcom could be restructured, its desire was "to remain with the Cemcom technology." It is evident that Oxychem chose the phrase "remain with" to convey the opposite meaning from the contract term "abandon"; it intended its desire to "remain with" the technology in the event of a restructuring to be understood in contrast to its intention to abandon the technology if its relationship with Cemcom was not restructured. It is also clear that Oxychem did not understand "remain with" to mean continuing as the licensee of the technology, because Oxychem would no longer be the licensee of the KNOW-HOW under its proposed restructured relationship with Cemcom. It follows from this understanding of the phrase "remain with" that Oxychem did not believe that the term "abandon" in the

agreement meant merely the termination of its licensee status. Rather, it apparently believed, as did Cemcom, that the term meant the severance of all connection, and the discontinuance of any association, with the KNOW-HOW technology.[3]

We hold, therefore, the section 11.3 of the agreement between Cemcom and Oxychem required a good faith

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3 Although Judge Shedd agrees that mere discontinuation of Oxychem's status as licensee does not constitute abandonment, he would have the district court determine on remand whether Oxychem had ever made a determination to "abandon" (as we herein define that term) — *i.e.*, whether it had ever made a determination to have nothing whatever to do with the technology. Judge Shedd apparently would hold that if Oxychem had at some point decided to abandon the technology, but subsequently changed its mind, it would have satisfied its contractual obligation to make a "determination to abandon" the technology. We doubt the parties intended such a result.

While Judge Shedd may agree with our definition of "abandon," *see post* at 7, it appears that he disagrees with our definition of "determination." Judge Shedd believes that a "determination" to abandon the technology can be a tentative, transient, or revocable decision. We believe that in this context a "determination" to abandon is necessarily a decision that is conclusive, continuous, and permanent. *See Webster's Third New International Dictionary* 616 (1986) (defining "determination" as "the act of deciding definitely and firmly esp. regarding a course of action"). Thus, in our view, even if Oxychem at some point tentatively decided to dissociate itself from the technology entirely, we would not reach a different conclusion than we reach today because the fact would remain that Oxychem thereafter decided that it might not abandon the technology (as evidenced by its letter of November 27, 1989). This equivocation is inconsistent with a "determination" to abandon, as we understand that term.

determination to sever all connection and discontinue any association with the KNOW-HOW technology. Because Oxychem's proposal to restructure its relationship with Cemcom was inconsistent with a determination to abandon the KNOW-HOW technology, as so defined, we reverse the judgment of the district court and remand for proceedings not inconsistent with this opinion.

REVERSED AND REMANDED

SHEDD, District Judge, concurring in part and dissenting in part:

I concur in the result reached by the majority because the district court misconstrued Section 11.3 of the Agreement. However, I disagree with the majority's finding, based upon this limited record, that Oxychem did not satisfy its obligation to make a good faith determination to abandon the technology, and I therefore dissent. In my opinion, a finding on this question should be made by the district court, after a full evidentiary hearing.

I agree with the majority's analysis that the parties meant by the use of the term "abandon" in Section 11.3 of the Agreement, that Oxychem would have no connection whatever with the KNOW-HOW technology. I further agree that the November 27th letter alone was insufficient to establish that Oxychem had made a good faith determination to abandon the KNOW-HOW and on this ground, I concur in the reversal of the district court.

The majority's opinion, however, forecloses the defendant from establishing, through evidence other than the

November 27th letter, that a determination to "abandon," as that term is interpreted by this Court, was made prior to November 27, 1991. I believe the case should be remanded with instructions to the district court to make a factual finding on the issue of whether, prior to sending the November 27th letter, Oxychem made a good faith determination to abandon the KNOW-HOW, applying the proper definition of "abandon."

The majority's opinion, however, foreclosures the defendant from establishing, through evidence other than the November 27th letter, that a determination to "abandon," as that term is interpreted by this Court, was made prior to November 27, 1991. I believe the case should be remanded with instructions to the district court to make a factual finding on the issue of whether, prior to sending the November 27th letter, Oxychem made a good faith determination to abandon the KNOW-HOW, applying the proper definition of "abandon."

The record indicates that Oxychem may be able to establish that, prior to November 27, it made a good faith determination to sever all connection and discontinue any association with the KNOW-HOW. The decision was communicated to Mr. Townsend, of Cemcom, who then initiated negotiations with Oxychem to restructure the agreement on terms more favorable

to Oxychem, in hopes of salvaging some financial support from Oxychem.[1]

Under this factual scenario, the district court may find that Oxychem made a good faith determination to abandon the KNOW-HOW. A determinative issue, which is not addressed in the majority's opinion, is whether the "good faith determination to abandon" provision precludes Oxychem from discussing proposals involving some arrangement short of total abandonment during the six month notice period.

The district court specifically ruled that "I do not find that as a matter of fact or law that the present wording of 11.3 was intended to preclude renegotiation." J.A. at 241. It is my opinion that the district court was correct on this issue. As a general legal principle of contracts, the fact that a notice of termination is accompanied by an offer to renegotiate, does not

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1 I am specifically referring to a letter written to Mr. Townsend from Oxychem dated May 1, 1990, which states:

> I had made a good faith determination to terminate the license agreement and abandon the technology well prior to my letter to you of November 27. In fact, our determination had been communicated to you by Mr. Luss and Mr. Koblin at several meetings with you prior to November 27, including a meeting in your offices on September 12, 1989. It was at this meeting, in fact, that you requested that Oxychem consider other alternatives to remain associated with the Cemcom business by converting its assets into an equity position in Cemcom, *as opposed to our expressed desired to exit the business*.

(emphasis added), J.A. at 290.

render it ineffective. *See Restaurant Associates, Inc. v. Anheuser-Busch, Inc.*, 422 F. Supp. 1105 (S.D.N.Y. 1976), *affirmed in part and reversed in part, on other grounds*, 559 F.2d 1205 (2d Cir. 1977).

However, Cemcom contends that Section 11.3 was intended to prohibit subsequent negotiations. The language of Section 11.3 does not contain any wording from which a prohibition on negotiations can be found. Under Cemcom's interpretation, if at any time during the six month notice period, Oxychem entertains the possibility of a new arrangement, then Oxychem must send another written notice of termination and wait six additional months. The ability to consider alternative courses of action, once a decision has been made to terminate an existing relationship, is so essential to business transactions that clear and specific contractual language should be required to prohibit this behavior.

In my opinion, since the Agreement does not contain an explicit prohibition on renegotiation, Oxychem did not have to refrain from considering restructured agreements during the notice period. Under the majority's view, the offer to restructure the relationship, contained in the November 27th letter, precludes a finding that Oxychem made a good faith determination to abandon the KNOW-HOW. To reach this conclusion, the majority must necessarily look beyond the plain meaning of the language used in the contract and rely on the extrinsic testimony of Mr. Townsend, cited in footnote two of the majority's opinion.

Section 11.3 provides that Oxychem may terminate the license agreement upon six months written notice. Section 11.3

further provides that a notice of termination "shall be ineffective unless Oxychem *shall have made* a good faith determination to abandon the KNOW-HOW." (emphasis added). Literally, this provision only requires that Oxychem make a determination to abandon the KNOW-HOW prior to sending a notice of termination. The requirement to make a good faith determination to abandon the KNOW-HOW is a condition precedent which must be satisfied before written notice of termination will be effective. If Oxychem made a good faith determination to abandon prior to sending the notice of termination, then the notice is effective. If not, the notice will be ineffective. Section 11.3 does not contain any explicit restrictions on Oxychem's intentions with regard to the KNOW-HOW, during the six month notice period.

The majority's reasoning extends the obligation of the condition precedent through the six month period following written notice of termination. In reaching its decision, the majority adopts Cemcom's interpretation of this provision, which is based upon the parol evidence of Dennis Townsend, president of Cemcom. *Supra at 5, f.n. 2.* However, at this stage, Oxychem has not had an opportunity to present its parol evidence on this issue. Therefore, at a minimum, the district court should make a factual determination, based on parol evidence, regarding

the effect Section 11.3 was intended to have on Oxychem's ability to negotiate during the six month notice period.[2]

For these reasons, I would reverse the district court and remand the case for a factual finding on the question of whether Oxychem made a good faith determination to abandon the KNOW-HOW, prior to sending the November 27th letter.

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2 Furthermore, even if the parties intended to preclude negotiations during the notice period, the facts may support a finding that Cemcom waived this provision, or is estopped from asserting this provision, by initiating negotiations after learning of Oxychem's desire to "exit the business." The majority's analysis does not appear to prohibit Oxychem from pursuing a defense of waiver or estoppel, on remand. This issue was not raised on appeal, and I note it only as an example for the need for a full evidentiary hearing on remand.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

---------- X

CEMCOM CORPORATION :

CIVIL NO. S-90-1617

v. :

OCCIDENTAL CHEMICAL CORPORATION :

---------- X

JUDGMENT

This action came on for a hearing on Motion of plaintiff for a Preliminary Injunction before the Court, Honorable Frederic N. Smalkin, United States District Court Judge, presiding. Upon oral order of the Court the trial on the merits was consolidated with the hearing for a preliminary injunction, pursuant to Rule 65(a)(2) of the Fed. R. Civ. P., for reasons stated in open Court.

The issues having been tried or heard, and the defendant having made an oral motion for involuntary dismissal under Rule 41(b) of the Fed. R. Civ. P. at the conclusion of the plaintiff's case, and the Court heard argument, and rendered its oral findings of fact and conclusions of law in open Court on June 26, 1990.

IT is this 26 day of June 1990, for reasons stated in open Court, ORDERED and ADJUDGED:

1. That the oral motion of defendant for involuntary dismissal under Rule 41(b) of the Fed. R. Civ. P. BE and hereby IS "GRANTED".

2. That judgment BE and hereby IS entered in favor of defendant against plaintiff, with costs.

FREDERICK N. SMALKIN, JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

- X

CEMCOM CORPORATION, :

Plaintiff, :

Civil No. S 90-1617

v. :

OCCIDENTAL CHEMICAL CORPORATION, :

Defendant. :

- X

ORDER

For the reasons stated in a Memorandum Opinion entered herein this date, it is, by the Court, this 18th day of July, 1990, ORDERED:

1. That the plaintiff's motion for a new trial BE, and the same hereby IS, DENIED; and

2. That copies of this Order and of the foregoing Memorandum be mailed to counsel.

Frederick N. Smalkin
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CEMCOM CORPORATION, :

Plaintiff, :

v. : Civil No. S 90-1617

OCCIDENTAL CHEMICAL CORPORATION, :

Defendant. :

MEMORANDUM OPINION

This case is pending on plaintiff's motion for a new trial. No further briefing or argument is needed.

The motion is denied. Not only was the prospect of consolidation under FED. R. CIV. P. 65(a) clearly announced by the Court at the commencement of the hearing, but the fact of consolidation was also clearly and timely announced and no timely objection was interposed, except to save the right to a trial on damages, should the Court find that the plaintiff was correct in its assertion of ineffectiveness of the notice of termination at issue. It is also evident that there is nothing that discovery could have added to the factual and legal questions presented by this suit, all of which go to the uncomplicated question of the sufficiency of a notice of termination under an unambiguous contract clause. This is a simple case (albeit an unusual one in today's world of over-papered litigation) which

should have been, and in fact was, ready for trial from the moment it was filed. Only a simple question of the efficacy of a termination notice was presented, and, for reasons stated amply in its oral opinion, the Court readily concluded that the notice of termination was effective. There is, thus, absolutely no reason to keep this dispute alive through further litigation over a supposed breach of the underlying agreement. If the agreement was properly terminated, which the Court has held it was, that termination was no breach. No other issue was presented in the complaint or survives for further trial, and the interests of justice do not demand that the results of the trial already held be vacated.

For the reasons stated, an order will be entered separately, denying plaintiff's motion for a new trial.

Dated: July 18, 1990

Frederic N. Smalkin
U.S. District Judge

(After recess:)

The Court: Be seated, please.

All Right, Counsel. Thank you for your excellent presentations and very professional way of handling the case both in court here this morning and in your written submissions.

I have decided to grant the motion under Rule 41(B), and I am going too enter judgment on the merits in favor of the defendant here.

The reason I am going to do it -- I am going to give you a little opinion now under Rule 52 which contains my findings of facts and conclusions of law, whether specifically so denominated or not.

The reason I reached this conclusion is as follows: First of all, with regard to the law of the matter, I find nothing in Maryland law, and certainly my job in a diversity case like this is to forecast what Maryland would do. See Wilson versus Ford Motor Company, which I think is in 653 F.2d, but I don't know that for sure.

In any event, my job in a case of this sort is to forecast the substantive law that the Maryland Court of Appeals would apply; and, frankly, the question is, the legal question is, which would -- and I will get into the factual matters later, but the legal question on the sufficiency of the notice under 11.3 and whether the attachment of the condition about restructuring, that is, the conditional language, specifically the language in the November 27 letter that says, first, this letter is Oxychem's

official notification that we intent to terminate the Cemcom license six months from the date of this letter if we are unable to restructure our relationship as described in this letter.

The question is whether the if clause there makes the notice insufficient as a matter of law, and my answer to that is no; and the reason for that is because the rule in Maryland generally with regard to sufficiency of contractual notice I think is stated by the Court in H & R Block versus Garland, 278 Maryland 91, and there there was a question of notice of termination of employment with conditional language, essentially saying to the employee you are out if you don't shape up, and the court in that case said that there was not even a jury question, that as a matter of law the notice was sufficient, there was no ambiguity, and the question is whether the letter was reasonably calculated to afford adequate notice.

In my judgment, accompanying the notice of termination under 11.3 with the conditional language made it no more than a termination with an offer to renegotiate, and the attachment of the offer to renegotiate by the use of the conditional clause. The preposition -- I guess it's a preposition -- "if" does not render the document as a whole so ambiguous as not to give reasonable notice that the relationship between the parties was off as of six months from November 27th, 1989. After all, that is the essence of the notice that is required, I think, in this regard.

Although it does not rely on Maryland law, the case of Restaurants Associates, et cetera versus an Anheuser-Busch, Inc., 442 F. Sup. 1105, Southern District of New York, 1976, applying Florida law, adequately states the general law on the topic which would be accepted by the Court of Appeals of

Maryland, and there there was an evergreen clause in the contract and there was a notice of nonrenewal, and the notice of nonrenewal or termination said that an Anheuser-Busch desires to renegotiate certain terms; this notice is being sent in compliance with paragraph 4(B).

Well, there in that letter was an explicit reference to the paragraph of the agreement that provided for termination. Here in our case there is no explicit reference to 11.3, but obviously that is the only place that the letter could find its bottom in the License Agreement because it refers to, A, formal notice and, B, six months, and, of course, that mirrors the language of 11.3.

At any rate, getting back to the Restaurants Associates case, the Court said that the Busch letter gave Associates sufficiently clear and unequivocal notice that the agreement would not be automatically renewed and would thus terminate at the end of the initial term.

The letter referred to the paragraph in the document which covered notice; and, as I said, here this letter does not expressly refer to it. That is, the November 27 letter does not expressly refer to the document, but by clear implication it arises under paragraph 11.3.

And the Court went on to say at 422 F. Supp. at 1108, "Busch's expression of its desire to renegotiate does not alter the fact that the letter was sufficient to put Associates on notice that there would not be an automatic renewal."

In this particular case it's clear to me that termination of the relationship between Oxychem and Cemcom had been raised

prior to November 27th, specifically at the meeting in September of '89, as Mr. Townsend's notes indicate, that the letter of November terminating it was not a surprise to him under those circumstances; and, frankly, I don't see any way that an experienced businessman could read the letter of termination and not realize that he had six months either to work out a deal with Oxychem, another deal with Oxychem, a restructuring, or that Oxychem was going to walk away from it at the end of six months, and he better have some alternative financing in place.

I think that is what happened in the Restaurants Associates case, and I think that that is the legal effect of this notice.

Certainly, these people are both sophisticated businesses. They have got to be held to a course of dealing and a usage of trade. There is no specific evidence of either one in this case. This is not a UCC case. So, we don't get into the evidentiary requirements of UCC 1-205 and notice and experts and all of that, but I still can take into account the fact that this is not a dealing between a consumer and car dealer. It's a dealing between two sophisticated business entities. Mr. Townsend is an entrepreneur obviously of some success and note, and Occidental Chemical is not necessarily your neighborhood snowball stand. These are two businesses that are sophisticated, and the real question is, as a legal matter, at least, whether the notice was enough to reasonably put Cemcom on notice that the relationship would be off in six months, and that is what paragraph 11.3 required, and that is what Oxychem gave, and that is what Cemcom got. So, that answers the question of law.

Going on to the question of fact that next rules, the question of fact is whether the plaintiff's evidence is sufficient to warrant

either going on with the trial to take further evidence on the question of good faith or rendering judgment at this point on it, and I wouldn't go on with the evidence unless I throught that the plaintiff had produced at least substantial evidence that there was a breach of the obligation of good faith in connection with the good faith abandonment, which is a condition precedent to giving the notice to terminate.

Now, the evidence indicates that the notice of termination clause emanated after there had been some negotiation over it. The original notice of termination clause that did not result, was not eventually incorporated, called for a nine-month notice, as I recall, or a 650 thousand-dollar payment on sixty days notice. I believe that is --

What is that exhibit, number 8? Let me see the plaintiff's exhibits.

Mr. Vettori: Plaintiff's 8.

The Court: That's what I thought it was. All right.

And specifically this -- it really was more of a one-way street. Well, this is a one-way street, too, at it resulted, but there was either nine months written notice or six months notice -- sixty days notice, that is two months notice with a $950,000 payment; and, in my judgment, the facts do not convince me that the present wording of 11.3 was intended to preclude renegotiation. I do not find as a matter of fact or law that the present wording of 11.3 was intended to preclude renegotiation.

Basically, the plaintiff's position is that the present wording of 11.3 requiring the good faith determination to abandon was essentially, and to find for the plaintiff I would essentially have to find that this was intended to preclude any kind of renegotiation or restructuring, that is, to prohibit the parties from continuing on in a relationship pertaining to this general subject matter after Oxychem had decided to give notice of determination or from and after the time they decided to get out of the existing relationship.

Frankly, it seems to me that the six months notice is simply a middle of the road bargain compromise between the prior parameters of the termination clause, that is, nine months on the one hand or two months with $950,000 on the other hand.

Now, certainly that clause is an unusual clause, but I do not see it, frankly, as having been breached in these circumstances.

It's certainly clear and the evidence is undisputed that Oxychem has been losing money consistently on this deal as it is now structured. The abandonment of knowhow, in my judgment, that clause does not mean that Oxychem would have to have made a decision that under all circumstances they wanted to be out of this business or any involvement at all with Cemcom.

Abandonment of the knowhow under that License Agreement means to me the abandonment of that knowhow under that License Agreement, that is, under the relationship of the parties as it was structured under the License Agreement; and, in fact, certain of the restructuring proposals were entirely

consistent with that, that is, that Oxychem would abandon its license rights and there would be a new entity set up.

Now, Oxychem might still be associated with that new entity as an equity partner or an equity owner or a limited partner, a corporate partner, or anything, but at least Oxychem would not be the licensee anymore itself under this License Agreement; and I think that abandonment of the knowhow used here should be given the meaning to include abandonment of the knowhow for the reason that under the License Agreement it was not profitable; and I find no facts sufficient to warrant a conclusion that Oxychem's decision to terminate and abandon the knowhow and give the notice of termination was not made in good faith.

Whether objective good faith or subjective good faith, there is no proof adduced in this record sufficient, in my judgment, to make out by any standard of proof. There is some circumstantial evidence, perhaps, based on Mr. Townsend's evidence, but that is not sufficient, in my judgment, to make out bad faith by Oxychem in any sense of the word.

I think that the evidence is convincing on the point that Oxychem realized that financially this was not an appropriate venture for them to be in, and they wanted to abandon it. They were essentially given license under the License Agreement to abandon it so long as they made that determination in good faith, and it seems to me the fact that they continued to lose money gives them a good faith basis for acting and making a determination that they wished to abandon the knowhow under the License Agreement, which is what in fact happened.

Now, it is true that there were negotiations undertaken. There was an invitation to renegotiate contained in the termination letter, and Mr. Townsend took up that invitation to renegotiate, but an offer to negotiate does not a contract make -- that is black letter law -- and there is no action where there has simply been an offer to enter into negotiations where negotiations don't prove fruitful in the long run, and I think that that is certainly generally known in the business world; and what essentially happened here was that, when there was an impasse in the negotiations, it became clear -- this is in March or April -- that it was time to start looking around for other kinds of financing sources to keep Cemcom going because Oxy wanted to pull out entirely and abandon this based on the current licensing agreement, which, in my judgment, was their right if at they were continuing to lose money. It is undisputed that they were continuing to lose money. And it is only at that point that Cemcom says, now, wait a minute, that letter you sent us back in November, that wasn't effective, send us a new one and we will get another six months, so we will buy more time; and I don't think that -- you know, if you are going to say that Oxychem sort of led Cemcom down the garden path by offering to renegotiate, the same can be said of Cemcom not questioning, at least in writing, the effectiveness of the termination letter until March or April. When weather started to cloud up, then they decided to examine the umbrella. Well, that is not the time to do it.

I think that the appropriate course of action, if there was some question about or ambiguity in the notice of termination of 27th, would have been to question it in November of 1989 or

December, or January, February, or March, not to wait until the renegotiation looked like it was not going to prove fruitful.

Now, I understand there is some gamble there, but I think that, because the agreement essentially gave the Oxychem a unilateral right to terminate so long as it was executed in good faith, the time for Cemcom to question that was not to wait all the way up until March.

Now, this is not determinative, but it certainly is an evidentiary fact that I have taken into account; and for those reasons, frankly, I find no breach of the contract in the notice of termination that went out, and judgment will be entered for the defendant forthwith with costs.

I will say this about Rule 11, in case counsel for the defendants are thinking about Rule 11 -- you can make any motion you want -- I disfavor Rule 11 motions. This is not the way people should practice law, number one. Number two, I will consider it if you submit it. However, I will tell you that this is not a question that is free from doubt, either factually or legally, and I think counsel had a good-faith basis for filing this suit.

Mr. D'Amico: We have no intention of filing Rule 11.

The Court: All right. That's fine.

All right. That is the judgment. Court will stand in adjournment.

Thank you, counsel.

Time for post-trial motions will be as set in Federal Rules of Civil Procedure. The local rules of the Court are not as explicit. So, ten days from the entry of judgment.

All right. Thank you, counsel. Court stands adjourned.

(Adjournment had at 12:30 p.m.)

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I hereby certify that the foregoing is a true and accurate transcript of the proceedings indicated.

/s/ Fred Sapperstein
Fred Sapperstein
Chief Official Reporter